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In The

Supreme Court of the United States

OCTOBER TERM, 1964

UNITED STATES OF AMERICA, PETITIONER

v.

S & A COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The respondent, S & A Company, respectfully prays that the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in the above-entitled case should be denied.

ARGUMENT

The petitioner in this case relies entirely upon asserted conflicts and contradictions claimed to have arisen in cases involving the general question whether a taxpayer is entitled to claim depreciation in the year of sale of depreciable assets where the sale price exceeds the undepreciated cost of such assets as of the beginning of the year of sale.

The petitioner in this case states the Commissioner's position to be that the resale price of depreciable assets, by definition, constitutes the "salvage value" of such assets, and that, since depreciable assets may not be depreciated below

a reasonable "salvage value", a taxpayer is not entitled to any depreciation deduction in the year of sale with respect to depreciable assets sold at a profit. In this case,* both the United States District Court for the District of Minnesota and the United States Court of Appeals for the Eighth Circuit rejected the Commissioner's position and held that the respondent was entitled to the deduction claimed by it on its federal income tax return for its fiscal year ending August 31, 1956, for an otherwise concededly reasonable allowance for depreciation for the period September 1, 1955, to April 1, 1956, with respect to depreciable assets which the respondent sold substantially prior to the end of the "useful life" of such assets for an amount in excess of the undepreciated basis of such assets as of September 1, 1955, as part of the unanticipated sale of its entire business on April 1, 1956.

The petitioner asserts that the holdings of the Courts in this case conflict with the decisions of the Sixth Circuit in *Cohn v. United States,* 259 F.2d 371 (6th Cir. 1958), and of the Second Circuit in *United States v. Motorlease Corp.,* 334 F.2d 617 (2d Cir. 1964), and *Fribourg Navigation Co. v. Commissioner,* 335 F.2d 15 (2d Cir. 1964). We understand this Court has granted petition for writ of certiorari filed by the taxpayer in the *Fribourg* case. The alleged conflict between *Cohn* and this case simply does not exist. As both the District Court (Appendix A, pp. 21-22, 23) and the Court of Appeals (Appendix B, pp. 39, 45, 58) pointed out in this case, the decision in *Cohn* in fact accords with the holdings of the Courts in this case.

The principles enunciated in the decisions of the Second Circuit in *Motorlease* and in *Fribourg* in fact are inconsis-

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*The decision of the District Court in this case is set out in the petitioner's petition for a writ of certiorari filed in this case, Appendix A, and the decision of the Court of Appeals is set out in Appendix B of said petition.

tent with the decisions in this case. We believe that the result reached by the Second Circuit in *Motorlease* is correct, but the reason stated by the Court is in error. The Second Circuit's majority opinion in *Motorlease* is brief and merely cites its majority opinion in *Fribourg* as controlling. The facts in *Motorlease* are substantially identical to the facts presented to this Court in *Massey Motors, Inc. v. United States,* 364 U.S. 92 (1960), and *Motorlease* should have been decided solely on the basis of this Court's opinion in *Massey Motors.* In *Fribourg,* the Second Circuit, in a 2-to-1 decision, approved the Commissioner's position by affirming a badly reasoned, single-judge Tax Court decision without helpful or pertinent elaboration. The majority opinion delivered by the Second Circuit in *Fribourg* was not well-considered, and its basic error is fully pointed out in the dissenting opinion filed in that case.

The errors of the Tax Court and of the Second Circuit in *Fribourg* have not been repeated. Shortly after the Second Circuit handed down its decisions in *Fribourg* and *Motorlease,* the Tax Court, in *Macabe Co., Inc.,* 42 T.C. ..... No. 87 (Sept. 29, 1964), a fully-reviewed decision, rejected the Second Circuit's decisions in *Fribourg* and *Motorlease* and its own decision in *Randolph D. Rouse,* 32 T.C. 70 (1962), which constituted the sole basis for its decision in *Fribourg,* repudiated the Commissioner's position, and reaffirmed the long-standing rule allowing a deduction for depreciation in the year of the profitable sale of depreciable assets. In cases decided by the Tax Court after its decision in *Macabe,* the Tax Court also has unequivocally rejected the Commissioner's position. *Smith Leasing Co., Inc.,* 43 T.C. ..... No. 5 (Oct. 20, 1964); *Moses Lake Homes, Inc.,* 23 CCH Tax Ct. Mem. ..... (CCH Tax Ct. Mem. 1964-289) (Nov. 5, 1964); *Harry Trotz,* 43 T.C. ..... No. 13 (Nov. 6, 1964); *C. L. Nichols,* 43 T.C. ..... No. 14 (Nov. 6, 1964); *Holder Driv-Ur-Self, Inc.,* 43

T.C. ..... No. 19 (Nov. 20, 1964); *Melvon C. Miller,* 23 CCH Tax Ct. Mem. ..... (CCH Tax Ct. Mem. 1964-305) (Nov. 20, 1964); *Bell Lines, Inc.*, 43 T.C. ..... No. 31 (Dec. 31, 1964), citing with approval the decision of the Court of Appeals in this case.

We submit that while a conflict exists between the Second Circuit's decision in *Fribourg* and the decisions of the Courts in this case, this conflict was borne of an obvious and fundamental error on the part of the Tax Court and of the Second Circuit which has not been and, on the basis of all of the reported decisions to date, apparently will not be repeated by other Courts. We, therefore, believe that the present conflict is not sufficiently serious or important to warrant granting the petition for a writ of certiorari in this case, particularly in view of the fact that this Court has granted certiorari in *Fribourg.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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